No. 15093

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AUTREY BROTHERS, INC., LEWIS AUTREY, STELLA AUTREY and SLEEP E-Z MATTRESS CO., a corporation,

Appellants,

vs.

FRANK M. CHICHESTER, as Trustee in Bankruptcy for the Estate of Veraco, Inc., doing business as Airest Mattress Co., Bankrupt,

Appellee.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

The appeal in this case is taken by all of the defendants from a decree of Honorable Thurmond Clarke, United States District Judge for the Southern District of California, assessing a money judgment against them in the sum of $86,315.62 actual and exemplary damages, as a result of a fraudulent scheme carried out by them, whereby the bankrupt estate was defrauded out of $76,315.62 worth of merchandise through the machinations of the defendants, individual or corporate, all of whom are very closely related. The court, in addition to the actual damages, assessed exemplary damages in the sum of $10,000.00 against them. (Civ. Code of Calif., Sec. 3294.)

A review of the background of this malodorous case we believe should satisfy this court that Judge Clarke was more than justified in his disposition of it. The plaintiff, Frank M. Chichester, is trustee in bankruptcy for the estate of Veraco, Inc. The schedules which were received in evidence by reference [Tr. p. 139] show huge liabilities amounting to $132,271.01. [Tr. p. 138.] The assets, at the bankrupt's own valuation, only amounted to $59,000.00 at the date of bankruptcy. [Tr. p. 140.] For some reason or other unknown to us, the defendants who were originally represented by Zeman, Hertzberg & Schekman, in their Answer in allegation No. VIII [Tr. p. 38], denied that the plaintiff was the duly alleged, qualified and acting trustee in bankruptcy for the estate of Veraco, Inc. This specious denial was overcome by our offer in evidence of the Order Approving the Trustee's Bond in the bankruptcy proceeding, its receipt thereby by the court with no objection on the part of Mr. Ross who represented the defendant at the trial. [Tr. p. 149.]

Insofar as the defendants are concerned, they are nothing more nor less than the Autrey family, all working together to defraud the creditors of Veraco, Inc., bankrupt, which had been controlled by Vernon W. Autrey. At the time the action was instituted on October 18, 1954, the trustee had uncovered the fact that in the month of November, 1953, the bankrupt, Veraco, Inc., had transferred entire stocks of merchandise in retail stores at Los Angeles, Bellflower and El Monte, in the State of California, another stock located in Salt Lake City, Utah, and two more stocks located in Portland, Oregon, and Seattle and Tacoma, Washington, to the defendant, Autrey Brothers, a corporation owned and controlled by the defendants, Lewis Autrey and Stella Autrey, husband and wife.

A suit was filed on October 18, 1954, to recover this merchandise. (See plaintiff's original complaint, pp. 3-35, inclusive.)

The Bulk Sales Laws of the various States in which these stocks were located were completely ignored by Vernon Autrey, controlling Veraco, Inc., and his brother and sister-in-law and their corporation, Autrey Brothers, Inc. The trustee alleged in his complaint that the transfers were brought about as a result of Lewis Autrey charging his brother, Vernon Autrey, with misappropriating or diverting the sum of $95,000.00 which he claimed was due the defendants, Autrey Brothers, and threatening him with criminal prosecution unless he turned the stores over to the defendant, Autrey Brothers, Inc. [Allegation No. V, Tr. p. 20.] The trustee also alleged that the transfers were effectuated with the intent and purpose on the part of the defendants, to hinder, delay or defraud both existing and future creditors of Veraco. [See Allegation No. VIII, p. 22.]

The defendants, through their attorneys Zeman, Hertzberg & Schekman, filed their answer to the complaint and as Exhibits "A" and "B" attached thereto, set out *totidem verbis* the memorandum agreements whereby these fraudulent conveyances were accomplished. These are found in the record as Exhibit "A" [Tr. p. 56] and Exhibit "B." [Tr. p. 58.] The answer was filed December 6, 1954. [Tr. p. 60.] Zeman, Hertzberg & Schekman were then acting as attorneys for the defendants.

Pursuant to the Federal Rules of Federal Procedure relating to "discovery" the plaintiff procured a *subpoena duces tecum* requiring the defendant, Lewis Buster Autrey, to produce an alleged Consignment Agreement he claimed to have, which would take the transfers of these stocks

out of the operations of the Bulk Sales Laws of the various States where these retail outlets were situated, in the deposition to be taken December 22, 1954, pursuant to notice to defendants. Autrey appeared at the taking of the deposition before Louis Sommers, a notary public at the office of counsel for the plaintiff accompanied by Harrison W. Hertzberg, one of the attorneys for the defendants. He did not bring the Consignment Agreement with him, Fifty-one pages of testimony were taken on December 22, 1954, and the deposition was adjourned to Thursday, January 6, 1955, at the same place.

When the deposition was resumed on January 6, 1955, an amazing situation came to light.

In October, 1954, the month the lawsuit was started against Autrey Brothers, Inc., Autrey had incorporated another corporation known as Sleep E-Z Mattress Co. [See Pltf. Ex. 2, p. 65.] This corporation was a mere shell, having no assets. [Pltf. Ex. 2, p. 69, lines 7-13.] The defendant, Lewis Buster Autrey, was president of this new corporation, one Robert Willey was vice-president, and the defendant, Stella Autrey, was secretary and treasurer of the new corporation. The stock in this new corporation was owned by Lewis Buster Autrey. [Pltf. Ex. 2, p. 62, lines 1-2.] On January 1, 1955, five days before the resumption of the taking of Buster Autrey's deposition, the assets that the trustee was seeking to pursue, were again transferred from Autrey Brothers, or Lewis Buster Autrey, to the corporation known as Sleep E-Z Mattress, owned and controlled by the defendants, Lewis Buster Autrey and Stella Autrey, his wife. [See Pltf. Ex. 2, p. 62, lines 1-10, and p. 69, line 7, to p. 70, line 5, incl.]

The deposition was concluded after these facts had been brought to light and a stipulation entered into that the deposition could be signed before any notary. [Pltf. Ex. 2, p. 81.] Nothing more was heard from Lewis Autrey and the deposition was never signed.

After learning of this latest move on the part of the defendants, counsel for the plaintiff, on motion granted, filed an amended and supplemental complaint joining the Sleep E-Z Mattress Co., as an additional party defendant. [Tr. p. 60 *et seq.*] The defendants then changed attorneys and the answer to this amended and supplemental complaint was filed by Mr. Bertram H. Ross, present counsel for the defendants. [Tr. p. 66 *et seq.*]

The case went to trial on January 11, 1956, before Honorable Thurmond Clarke, United States District Judge, and very early in the case it was demonstrated how cleverly the members of the Autrey family were working together to thwart the trustee in his efforts to undo the damage theretofore done by them.

Notwithstanding the fact that they had been sued for a sum total of over $86,000.00 and had asserted in their answer a counterclaim against the trustee in the sum of $54,962.28 [Tr. p. 55], neither of the defendants, Lewis Autrey or Stella Autrey, individually, or as officers and directors of the defendant corporations, Autrey Brothers, Inc., and Sleep E-Z Mattress Co., appeared at the trial before Judge Clarke. Very fortunately, the trustee had placed Vernon Autrey, president of the bankrupt corporation, under subpoena. When he was called as a witness for the trustee, notwithstanding the fact that he had theretofore claimed to have been blackmailed out of several retail outlets of Veraco, Inc., by his brother, he attempted to wreck the trustee's case at the very onset of his testi-

mony. After stating his name and address, he was asked if he was an officer of the bankrupt corporation, Veraco, Inc., he answered:

> "I would like to refuse to answer any questions today on the grounds that it might incriminate or degrade me in certain matters of different things, and until I have advice from my attorney and have him present." [Tr. p. 97.]

Judge Clarke overruled the refusal of the witness to state whether he was an officer of the bankrupt corporation on the ground that his answer would tend to incriminate him, and he then proceeded to testify that the bankrupt, Veraco, Inc., was engaged in the retail bedding business and that he was president thereof; that Lewis Autrey was his brother and Stella Autrey his sister-in-law that the defendant Autrey Brothers, Inc., was a California corporation owned and controlled by Lewis B. Autrey and that he, Vernon, operated and controlled the bankrupt, Veraco, Inc. [See Tr. pp. 98-99.] He testified that Autrey Brothers, Inc., manufactured the products and Veraco, Inc., retailed them from its places of business in California, Oregon, Washington, Utah and Arizona.

At pages 100 and 101 of the Transcript he testified to the transfers of these retail outlets to Autrey Brothers, Inc. At page 102 of the Transcript he testified that Lewis B. Autrey had accused him of stealing many thousands of dollars and that he threatened criminal prosecution of Vernon unless four stores were transferred to Autrey Brothers, Inc. The "charge" involved figures ranging from $50,000.00 to $200,000.00. [Tr. p. 103.] Being frightened as a result of these vague charges of embezzling from $50,000.00 to $200,000.00, the transfer of certain outlets was made, consisting of equipment,

trucks and stock worth $40,000.00 or $45,000.00. [Tr. p. 103.] About two weeks later, two more stores were transferred. These stores were located at Seattle, Tacoma and Portland, Oregon, and according to the President of the bankrupt corporation, Vernon W. Autrey, he had undertaken to pay the defendants $7,000.00 a week, and in lieu of that $7,000.00 a week, he transferred the Oregon and Washington stores. It has been admitted throughout the entire trial of this case that no attempt was made to comply with the Bulk Sales Law of any of the States wherein these retail outlets were located. It is interesting to note from the testimony of Vernon Autrey at [Tr. pp. 109, *et seq.*] how these stores were maneuvered around from one corporation to another controlled by the Autrey brothers until ultimately a substantial portion of them landed in the hands of the CAC Corporation, now in bankruptcy in Referee Bergner's court in Los Angeles. [Tr. p. 111.] At least half of it got back into Vernon Autrey's hands by circuitous routes. [Tr. pp. 111, 112.]

The various names under which these corporate brothers operated is positively bewildering. Throughout the transcript, including the deposition of Lewis B. Autrey, we encounter the following: Autrey Brothers, Inc. Veraco, Inc., dba Airest Mattress Co., Mattress City at Salt Lake City organized under the laws of the State of Texas [see Tr. p. 109], CAC Corporation, and Airest Mattress Co. [Tr. pp. 151-160.] There were four Autrey brothers engaged in the same business, Floyd Autrey, Lewis B. Autrey, Vernon Autrey and E. T. Autrey. [Tr. p. 112.] The CAC Corporation, which likewise landed in bankruptcy, later, after the stock in Portland, Oregon, had been removed to Seattle, Washington, four or five months before the trial, was owned by the President of Veraco, Inc., Vernon Autrey and Harry Traub, its accountant.

We are satisfied that an examination by this court of the transcript of testimony taken and the exhibits received, particularly the damaging deposition of Lewis B. Autrey, which he did not sign, and studiously stayed away from the trial, will convince this court as it did the trial court that these defendants, and undoubtedly the President of Veraco, Inc., Vernon Autrey, were in a vicious scheme to hinder, delay or defraud all creditors. We are likewise satisfied that the alleged quarrel between Vernon and Lewis B. Autrey was nothing more than a sham battle to raise a smoke screen under which these brothers could maneuver their stocks in trade with bewildering speed similar to the manipulator of a shell game at county fairs of years ago.

The Law.

We believe the first question that will have to be disposed of is whether or not Judge Clarke erred in admitting the unsigned deposition of Lewis B. Autrey. [Pltf. Ex. 2.] As heretofore stated, this deposition was started on December 22, 1954, adjourned after fifty-one pages were taken, and resumed January 6, 1955. During the adjournment, the witness Autrey proceeded to again transfer the property which the trustee was pursuing, to the empty corporation which he had organized at the time the suit was filed. Notwithstanding the fact that his Attorney stipulated that the deposition could be signed before any Notary, Autrey never appeared again either to sign the deposition or to fight the charges against him at the time of the trial. Counsel for the plaintiff, on learning that Autrey was not present at the trial and would not be, proceeded to call Louis Sommers, the court reporter before whom Autrey's deposition had been taken.

[Tr. p. 125 *et seq.*] The full foundation was laid by showing that Autrey had been sworn, that his testimony was taken down in shorthand and correctly transcribed into long hand, and that the deposition was a true and correct transcript thereof. [Tr. pp. 125-131, incl.] That this transcript was admissible despite the objections of present counsel for the defendants is supported by very respectable authority. In the case of *Sampsell v. Anches,* 108 F. 2d 945, at 955, this court reversed the District Court for the Western District of Washington for erroneously excluding an examination of the defendant, Nathan Anches, taken under Section 21a of the Bankruptcy Act in the matter of Sam Gold, Bankrupt, which had been offered in evidence in a plenary action, wherein Anches was a defendant. We quote from the opinion of Judge Wilbur holding that the 21a transcript was admissible:

> "Two other points relied upon by appellant will be briefly mentioned. Under point 25 in his brief appellant contends that the court erred in sustaining appellees' objection to the introduction in evidence of the transcript of the testimony of appellee N. Anches, taken under Sec. 21, sub. a of the Bankruptcy Act, 11 U. S. C. A. Sec. 44, sub. a. The trial court ruled the evidence out upon the ground that it was in the nature of a deposition and if the witness could be produced in court at the trial, the testimony offered could not be used. This was error. Even if we assume that the proceeding under which the testimony was taken was in the nature of a deposition it was clearly admissible as an admission of a party against interest. As such, it was immaterial whether or not the witness was able to testify or had testified in the action in which he was a party. Kneezle v. Scott

County Milling Co., Mo. App., 113 S. W. 2d 817; Cote v. Sears, Roebuck Co., 86 N. H. 238, 166 A. 279; Reilly v. Buster, Tex. Civ. App., 52 S. W. 2d 521; Newby v. Gibson, 6 Cal. App. 2d 359, 44 P. 2d 468. See 22 C. J. 342, Sec. 387; Slattery v. Dillon, 9 Cir., 17 F. 2d 347. Another ground relied upon by the trial court in excluding that evidence was that the transcript consisted of a bound book containing the testimony of other witnesses which, under Washington statutory law (section 308-5, Remington's Revised Statutes of Washington might be taken by the jury to the jury room. All that was offered in evidence was the testimony of N. Anches which counsel offered to read. This was the proper way to adduce the evidence. The evidence consisted of statements of the witness concerning the circumstances under which he made his purchases from the bankrupt. It tended to show that the purchases were not made in good faith and thus was pertinent to the issues in the case."

If there were more justification for admitting this unsigned deposition as an admission against interest on the part of the defendant Autrey and the corporation, we will compare the situation in the two cases. In *Sampsell v. Anches,* the transcript in question was a transcript of an examination under Section 21a in the matter of Sam Gold, bankrupt, conducted in ancillary proceedings in Seattle long prior to the institution of any suit against N. Anches & Son. Anches was examined as a witness in the Gold bankruptcy. He made a number of admissions in this examination which the trustee deemed damaging. Later on, in an independent action filed under Section 70e of the National Bankruptcy Act in the Western District of Washington, the trustee sought to intro-

duce this 21a transcript in evidence against Anches even though Anches was there in the court room and represented by counsel. Upon objection by counsel for the defendants, N. Anches & Son, the objection was sustained, the 21a transcript excluded, and the writer, one of the Attorneys for the plaintiff, denied the right to read the testimony of N. Anches to the jury. This was declared by Judge Wilbur to be error and in his ruling the District Court had gone flatly in the face of a prior holding by this court in the case of *Slattery v. Dillon,* 17 Fed. 2d 347, holding such evidence admissible.

In the case at bar, it is evident from a reading of the deposition in question that the defendant, Lewis B. Autrey, had engaged throughout in every possible subterfuge to avoid giving honest or frank answers to questions propounded to him. With no Judge present to hold him in line, he had evaded, ducked and dodged throughout the entire transcript. When it was completed, he did not sign it. When the case was called for trial, he avoided being called as an adverse witness under the provisions of Section 21j of the National Bankruptcy Act, 11 U. S. C. A., Section 44, Subdivision (a) which provides that in any plenary suit brought under this Act if it shall appear that the interest of the witness is adverse to the party calling him, such witness may be examined as if under cross-examination and the party calling him shall not be bound by such testimony. If this court was prepared to hold in the *Anches* case (another bare faced fraud) that with Anches present in the court room the trustee had a right to introduce a 21a transcript as part of a substantive case in accordance with the law laid down in *Slattery v. Dillon, supra,* certainly Judge Clarke was more than justified in admitting the unsigned deposition of Lewis B.

Autrey as an admission against interest under the rule laid down in *Sampsell v. Anches* and *Slattery v. Dillon.*

That deposition taken on notice to all of the parties at which the defendants were ably represented by Attorney Hertzberg graphically demonstrated the fraud perpetrated by members of the Autrey family against the unfortunate creditors of Veraco, Inc. The facts shown in this deposition and the testimony of Vernon Autrey, brought out after he had attempted to claim a constitutional privilege against self incrimination, demonstrated by clear, convincing evidence a scheme whereby Veraco, Inc., in a matter of hours, had unloaded thousands of dollars worth of merchandise from the bankrupt corporation controlled by Brother Vernon Autrey to another corporation controlled, directed and officered by Brother Lewis Buster Autrey and Sister-in-Law Stella Autrey, and while the deposition was pending incomplete, the latter two had placed the merchandise still further beyond reach by a second quick transfer to Sleep E-Z Mattress, Inc., owned, controlled and dominated by the defendants Lewis B. Autrey and Stella Autrey, his wife, and further, after the commission of the acts complained of in the suit, Lewis B. Autrey and his wife, Stella Autrey, had disposed of their stock in Autrey Brothers, Inc., to one of the other brothers, Eugene Autrey, who had then transferred the stock to one, Alvis Dunbar. [See Tr. Ex. 2, pp. 76, 77.]

After alleging in their verified answer that the merchandise transferred in violation of the Bulk Sales Laws of four States was merchandise that was under consignment, and their promise to produce the alleged Consignment Agreement in the resumed deposition, it developed at [Pltf. Ex. 2, p. 75 *et seq.* of Dep.] that the only alleged consignment agreement between the parties was an

oral agreement claimed to be entered into by Lewis Autrey with Vernon Autrey with the defendant, Stella Autrey, present.

We respectfully submit that the deposition was properly received in evidence, properly considered by the trial court and that the judgment is solidly founded on facts dragged out from the wily Autrey brothers.

The Fact That the Defendants Did Not Appear at the Trial of the Case and Did Not Offer Any Evidence Whatever in Support of Their Contentions Requires an Affirmance of the Judgment of the Lower Court.

Bearing in mind that the machinations involved here are entirely within the Autrey family between Vernon Autrey, holding and controlling the bankrupt Veraco, Inc., and Lewis B. Autrey and his wife, owning and controlling the defendants, Autrey Brothers, Inc., and Sleep E-Z Mattress, Inc., it was at least incumbent on the defendants to produce some testimony in support of the honesty of the transactions between them. As was said by Professor Glenn in his work "The Law of Fraudulent Conveyances" at page 413:

> "When the grantee is the debtor's wife or husband, as the case may be, or any member of the household, the circumstance puts a certain duty upon the grantee. It is not a badge of fraud in the sense that a *prima facie* case is made against the grantee by the circumstance alone. But it is an aid to the creditor in that only slight evidence in addition is required for a *prima facie* case. And if, at the close of the whole case, the grantee has not given evidence, or presented good excuse for not taking the stand, the creditor should recover."

As authority for that statement Professor Glenn cites the following authorities: *Seitz v. Mitchell,* 94 U. S. 580; *Jarrard v. Motley* (Ga. 1930), 154 S. E. 253; *Parker v. Fenwick,* 147 N. C. 525, 61 S. E. 378; *Hedrick v. Hockfield,* 283 Fed. 574; *Hutcheson v. Savings Bank, etc.,* 129 Va. 281, 105 S. E. 677; *First Nat. Bank v. Danser,* 70 W. Va. 529, 74 S. E. 623.

In *Seitz v. Mitchell* cited as authority by Professor Glenn, the Supreme Court of the United States said:

> "She avers that she paid it with means and money earned and procured wholly by herself. Of that there is no proof, nor attempt to adduce proof; though, if the fact were so, the means of proving it must have been peculiarly within her knowledge and power, and we have already observed that money procured by her earnings belonged to her husband, and was not her separate property. To hold that conveyances thus taken and thus paid for are sufficient to protect the property against creditors of an insolvent husband would be making fraud both profitable and easy."

The ultimate transferee of these assets, the defendant, Sleep E-Z Mattress Co., owned and controlled by the defendants Lewis B. Autrey and his wife Stella Autrey [Pltf. Ex. 2, pp. 69, 70] had no assets at all when the Autreys proceeded to dump the property the trustee was seeking from Autrey Brothers, Inc., to Sleep E-Z Mattress Co. We quote from Buster Autrey's deposition [Pltf. Ex. 2, p. 69]:

> "Q. Isn't it a fact in November of 1954, this corporation, Sleep E-Z Mattress Company, didn't own any assets of any kind or description; just yes or no? I am talking about the corporation, I am not talking about you. A. I don't guess it did. Any assets?

Q. Yes. A. No.

Q. Wasn't that corporation formed for the purpose of putting your business out of your name after this suit was filed? A. No sir.

Q. Who is the president of Sleep EZ Mattress Company? A. I am.

Q. Who is the vice president? A. Robert Willey.

Q. Who is the secretary and treasurer? A. My wife.

Q. Stella Autrey, a defendant here? A. That is right.

Q. To boil the whole thing down then to its ultimate conclusion, since this lawsuit was started you have gotten out of your name everything except your home. Isn't that right? A. It is still in my name. It is mine, and that is it.

Q. You understand you are under oath here? A. Yes.

Q. You mean to say that you have not put everything out of your name except your home since this lawsuit was started? I want your answer under oath. A. We were incorporating. It is the same as if I owned it now. It is the same thing.

Q. You incorporated this corporation in October, didn't you? A. We formed one, yes.

Q. In October, November and December of 1954 that corporation didn't own a thing, did it? A. No. It still doesn't.

Q. Then on January 1, 1955, after your deposition had been partially taken in this case, you transferred the stores to Sleep EZ Mattress, Inc. A. What you are trying to put in my mouth—

Q. I am just asking for the facts. A. The fact of it is, if that is what you want, I am trying to pro-

tect the name Sleep EZ Mattress by incorporating it. I understand that no one else can use the name Sleep EZ Mattress as a company or anything else. I am trying to protect the name Sleep EZ by incorporating. Everything that I own I have in it, except my home, but it is still mine, and it is the same as if I was an individual anyway. If that is hurting your feelings—

Q. You can't hurt my feelings. A. But it makes me no difference.

Q. I just want to get you down here under oath on a few things. A. Because I own nothing anyhow, it is just the creditors' money that you are fighting over. The same ones that I owe, he owed."

We will refer briefly to the law of California where skeleton corporations with little or no financing are involved. In *Carlesimo v. Schwebel,* 87 Cal. App. 2d 482, at page 493, the court said:

"We think the proper rule is that inadequate financing, where such appears, is a factor, and an important factor, in determining whether to remove the insulation to stockholders normally created by the corporate method of operation. But in such a case it is incumbent upon the one seeking to pierce the corporate veil to show by evidence that the financial setup of the corporation is just a sham, and accomplishes injustice. In the instant case the plaintiff made no such showing. He not only failed to show, as a fact, that the corporation was inadequately financed, but failed to show any casual connection between the financing and the injury."

In the case at bar, we definitely established by the testimony of Lewis Buster Autrey that the defendant, Sleep E-Z Mattress, Inc., owned, controlled and officered by him

and his wife, was nothing but a hollow shell and a sham and was used as a receptacle in which to dump the fraudulently conveyed assets, even while the case at bar was pending. The conduct of the Autrey family in connection with the failure of Veraco, Inc., and the disposal of its assets was such as to arouse the indignation of an able trial Judge and resulted in Judge Thurmond Clarke rendering judgment for the trustee for the value of the property so transferred, together with exemplary damages against the actors under Section 3294 of the Civil Code of California.

The defendant, Stella Autrey, was not a mere innocent bystander as is so earnestly contended by counsel for the appellants. Stella Autrey was a stockholder in the original fraudulent transferee, Autrey Brothers, Inc. At page 3 of Plaintiff's Exhibit No. 2, Lewis B. Autrey admits that all of the capital stock of Autrey Brothers, Inc., was owned and controlled by himself and his wife, Stella Autrey, prior to the filing of the complaint. He admitted that prior to the filing of the complaint he had owned 4,000 shares of Autrey Brothers, Inc., out of 5,000 shares. His wife, the defendant, Stella Autrey, owned 999 shares; the other share was owned by one, Robert Willey, who was Vice-President and an employee of Autrey Brothers, Inc. [See Tr. Ex. 2, pp. 3, 4.] After the suit was started, the witness, Lewis Buster Autrey, and Stella Autrey relieved themselves of their stock to one, E. T. Autrey. [Pltf. Ex. 2, p. 4.] They sold the stock to E. T. Autrey on November 8th, after the suit was filed. [Pltf. Ex. 2, p. 5.] Autrey testified that our lawsuit had ruined his credit. The stock then found its way from E. T. Autrey to one, Alvis Dunbar, who was a former employee who had been fired and now turned up, so far

as the defendant Lewis Autrey knew, as the sole stockholder of Autrey Brothers, Inc. [See Pltf. Ex. 2, p. 6.] The defendant, Sleep E-Z Mattress, was then incorporated in October of 1954, the month in which the action in the lower court was filed [Pltf. Ex. 2, p. 65], and remained an empty shell from the date of its incorporation until January 1, 1955, when the merchandise sought to be recovered by the trustee was transferred to it. [See deposition of Lewis B. Autrey, pp. 63-69.] Stella Autrey, former stockholder of the defendant, Autrey Brothers, Inc., was Vice-President of the corporation known as Sleep E-Z Mattress, Inc. She, like her husband, scrupulously refrained from appearing at the trial of the above entitled matter, and there is no evidence whatsoever of her disapproval of the activities of the corporation in which she was Vice-President. It is very evident from a reading of the entire deposition of Autrey that, with this suit directed against him and his wife, he proceeded to cover up or dispose of every bit of property that he owned. He borrowed $30,000.00 on certain real property which had theretofore been owned by Autrey Brothers, Inc., and transferred the remaining equity to Sleep E-Z Mattress. His home, which was worth $20,000.00, prior to the filing of this suit was encumbered by a $2,500.00 mortgage. In October 1954 when the suit was started, he borrowed $5,000.00 more against his home from a loan company. When he got through he had rendered himself as execution proof as possible. The entire scheme involved here is between members of the Autrey family and none of the defendants had the courage to appear before Judge Clarke and give their version of the weird maneuvers indulged in by them.

We quote from the District Judge before whom the case of *Hedrick v. Hockfield,* 283 Fed. 574 was tried:

> "Eliminating, for the present, other phases presented by the evidence, the primary and essential question to be decided is whether, upon the undisputed facts, the plaintiff has sustained his allegation of fraud. It is an elementary principle, based upon and amply vindicated by experience, that when an insolvent debtor conveys his property to a near relative, the effect of such conveyance being to place such property beyond the reach of his creditors, and the validity of such conveyance is called into question by his creditors, the court requires that such relatives, claiming to have acquired title to such property, show by satisfactory evidence that the conveyance was based upon a valuable consideration, free from any intention on the part of the debtor, known to or participated in by the grantee, to hinder, delay, or defraud his creditors."

We also direct the court's attention to the footnote set forth in the opinion of the Supreme Court of the United States in *Pepper v. Litton,* 308 U. S. 295, under note 28:

> "On this point the District Court said: '"An examination of the facts disclosed here shows the history of a deliberate and carefully planned attempt on the part of Scott Litton and Dixie Splint Coal Company to avoid the payment of a just debt. I speak of Litton and Dixie Splint Coal Company because they are in reality the same. In all the experience of the law, there has never been a more prolific breeder of fraud than the one-man corporation. It is a favorite device for the escape of personal liability. This case illustrates another frequent use of this fiction of corporate entity, whereby the owner of the

> corporation, through his complete control over it, undertakes to gather to himself all of its assets to the exclusion of its creditors."

We also quote from the language of Justice Douglas in the same case of *Pepper v. Litton* as follows:

> "Thus, salary claims of officers, directors and stockholders in the bankruptcy of '"one-man"' or family corporations have been disallowed or subordinated where the courts have been satisfied that allowance of the claims would not be fair or equitable to other creditors. And that result may be reached even though the salary claim has been reduced to judgment."

In the case at bar we are dealing with a group of family corporations, brothers and husband and wife. All of their efforts were directed toward a scheme to hinder, delay or defraud creditors scheduled in the sum total of $132,271.01. [Tr. p. 138.] The bankrupt, at its own figure, had only $59,565.40 worth of assets to meet this large indebtedness. Of these assets, $46,235.40 constituted accounts receivable. [Tr. p. 140.]

The merchandise transferred having been placed beyond the reach of the trustee by the secret and speedy actions of the members of the Autrey family, the trustee would then be entitled to recover judgment against the joint tortfeasors for the value of the merchandise so withdrawn from the trustee's reach. (See *Brainard v. Cohn,* 8 F. 2d 13.)

The Nature and Validity of the Times-Mirror Co. Claim.

Was the Times-Mirror Co., a creditor who could have avoided the transfer of these retail outlets either by reason of violation of the Bulk Sales Laws of the various States or by reason of the fact that the transfers were made with intent to hinder, delay or defraud creditors in violation of Section 67 of the National Bankruptcy Act? The Times-Mirror Company was a creditor of the bankrupt corporation in the sum of $2,465.87 at the date of bankruptcy. The Times-Mirror Company publishes two newspapers, the Los Angeles Times and the Los Angeles Mirror, and the advertising accounts of both papers were kept separately. The Times-Mirror Company, a creditor, is a corporation organized under the laws of the State of California. [Tr. p. 85.] The ledger sheets of the creditor, on open account, are in evidence as Plaintiff's Exhibits 1A and 1B. They would appear, in connection with the testimony of William Bradshaw, Assistant Credit Manager of the creditor, to be somewhat confused as a result of belated posting. His testimony commencing at page 83 is more or less confused until he reaches page 93 of the Record. At that time a short recess was taken in order to give him an opportunity to reconcile the figures of the two ledger sheets, and after the recess he was asked the following question beginning at page 93:

> "Q. I believe the pending question was whether or not on November 9th, 1953, or at any time thereafter, the bankrupt, Veraco Inc., owed the Times-Mirror Company nothing on open account. A. Do you want me to—just yes or no?

Q. Yes. A. At no time.

Q. (By Mr. Tobin): In regard to the Times, I believe you testified on direct examination that there was one time, in January, I believe, of 1954, that the Times account had balanced out? A. Yes.

Q. Can you tell us whether or not there had been a debit item against the bankrupt prior to January 18th which had not yet been posted?

Mr. Ross: Just a moment. I object to the question on the ground that the documents are in evidence and they speak for themselves.

Mr. Tobin: According to the records—

Mr. Ross: It is not the best evidence when the documents are before the court.

The Court: I will overrule the objection. I will let him answer.

The Witness: Answer the question?

The Court: Yes.

The Witness: On January 18th, where the last payment previously mentioned brought it into balance, the next posting was an item of January 17, 1954, for an advertisement in the amount of $369.60.

Q. (By Mr. Tobin): That is $369.60? A. $369.60. That particular January 17th posting, which, according to the books, should have been posted prior to the January 18th occasion, would have left that amount of balance owing at that particular time.

Q. And unpaid? A. As an unpaid item."

It now appears to be perfectly clear that the previous answers given by the witness were in error, inasmuch as an item of January 17th had not been posted to the ledger account until after January 18th, the date when the account appeared to have been brought into balance.

Section 3430 of the Civil Code of California defines "creditor" as follows:

> "A creditor, within the meaning of this title, is one in whose favor an obligation exists, by reason of which he is, or may become, entitled to the payment of money."

Section 67c of the Bankruptcy Act defines a "creditor" as being a person in whose favor a debt exists.

Section 67d, subdivision (2), of the Bankruptcy Act reads as follows:

> "Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this act by or against him is fraudulent, (d) as to then existing and future creditors, if made or incurred with actual intent as distinguished from intent presumed in law to hinder, delay or defraud either existing or future creditors."

It is obvious that the Times-Mirror Company was an existing creditor at the time of the transfers complained of in the sum of $369.60. [R. p. 95.] At the date of bankruptcy it was an unpaid creditor in the sum of $2,465.87 according to the plaintiff's complaint. [Tr. p. 6.] It was stipulated that the Times-Mirror Company had filed its Proof of Debt in the bankruptcy proceeding of Veraco, Inc. [Tr. p. 88] and an unpaid balance due on the Mirror account in the amount of $1,646.54 was charged off according to the testimony of the witness, Bradshaw, on August 27, 1954.